Duquesne Law Review

Volume 32 | Number 4 Article 4

1994

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I. INTRODUCTION

In recent years, Operation Rescue and other opponents of the constitutionally protected right of freedom of choice have employed an effective tactic to frustrate and impede women seeking to obtain abortions at health care facilities. These groups have organized blockades of abortion clinics, denying women access to these facilities and forcing the clinics to remain closed during these campaigns. Often these blockades targeted small towns and cities and overwhelmed the ability of local law enforcement agencies to protect women seeking abortions. Due to the sheer number of blockaders, the police frequently were unable to prevent the blockaders from denying ingress or egress to the clinics. In light of these efforts to deny women access to abortion facilities, the National Organization for Women and similar organizations instituted federal actions to enjoin the blockades under 42 U.S.C. § 1985(3).[1]

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I with to thank Adjunct Professor Elfrida A. Scott-McLaughlin, my colleague and wife, for her constant support, review and critique of an earlier draft of this article. Additionally, I wish to thank Dan Cherner and William Devito, two of my research assistants, who have worked with me steadfastly throughout their law school careers on several of my research and litigation projects. Finally, I thank Cheol Kim and Harry Phillips for their assistance in the research phase of this article.

1. Section 1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspir-

A § 1985(3) claim arises when a plaintiff can prove the existence of a private conspiracy aimed at interfering with constitutionally protected rights secured against private encroachment.[2] The plaintiffs argued in these cases that abortion is a constitutionally protected right and that the blockades were part of a conspiracy to prevent women from exercising a federally protected right to travel interstate to obtain abortion-related services.[3]

These injunctive actions were successful in cases from Wichita, Kansas, to New York, New York.[4] The federal courts that awarded injunctive relief determined that § 1985 provided a federal remedy against groups of individuals who sought to blockade abortion clinics. Given the numerous cases from various states involving abortion clinic blockades, it was evident that this activity was national in scope and was designed to interfere with the exercise of the constitutionally protected right of women to obtain abortion related services. The cases also revealed that local law enforcement agencies were either unable or unwilling to guarantee women the equal protection of the laws. Thus, the use of § 1985(3) was essential to the vindication of the right of women to exercise their constitutional rights. By providing a federal injunctive remedy, the courts were able to employ federal marshals and utilize the contempt power to jail or fine violators of the injunctions.

On January 12, 1993, the United States Supreme Court, by a five

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acy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3) (1988).

2. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971).

3. *See, e.g.*, National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

4. *See, e.g.*, Volunteer Medical Clinic, Inc. v. Operation Rescue, 948 F.2d 218 (6th Cir. 1991); National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990); Women's Health Care Serv. v. Operation Rescue-National, 773 F. Supp. 258 (D. Kan. 1991); Planned Parenthood Ass'n. v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); National Org. for Women v. Operation Rescue, 747 F. Supp. 760 (D.D.C. 1990); Southwestern Medical Clinics v. Operation Rescue, 744 F. Supp. 230 (D. Nev. 1989); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S.Ct. 753 (1993); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 712 F. Supp. 165 (D. Ore. 1988); Roe v. Operation Rescue, 710 F. Supp. 577 (E.D. Pa. 1989); New York National Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), *aff'd*, 886 F.2d. 1339 (2nd Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *but see* Lucero v. Operation Rescue, 772 F. Supp. 1193 (N.D. Ala. 1991), *aff'd*, 954 F.2d 624 (11th Cir. 1992); National Abortion Fed'n v. Operation Rescue, 721 F. Supp. 1168 (C.D. Cal. 1989).

to four majority, held that the federal courts did not have authority under § 1985(3) to enjoin abortion clinic blockades.[5] The majority took an exceedingly narrow view of the scope of the statute and, constrained by precedent,[6] determined that the respondents had not demonstrated that the petitioners' blockades were motivated by a class-based invidiously discriminatory animus or that they sought to interfere with constitutional rights protected against private encroachment.[7] The dissenters took issue with the majority's interpretation of the statute and questioned both the *Griffin* and *Scott* requirements.[8]

In the aftermath of the *Bray* decision, abortion rights activists turned to Congress to remedy the removal of an important federal remedy in the struggle between pro-choice and right-to-life organizations. On February 3, 1993, Representatives Charles Schumer and Constance Morella introduced the Freedom Of Access To Clinic Entrances Act of 1993.[9] The bill seeks to create a new federal criminal offense when an individual physically obstructs access to a medical facility.[10] Additionally, the proposed legislation would provide a civil cause of action for damages and injunctive relief on the basis of the same acts covered under the criminal provisions of the bill.[11] A similar bill was introduced in the Senate by Senator Edward Kennedy.[12] The Senate Bill provides for both civil liability and criminal penalties in cases involving the blockades of medical facilities.[13] If enacted, these bills could assist in replacing the pro-

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5. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993). Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices White, Kennedy and Thomas joined. Justice Kennedy wrote a separate concurrence. Justice Souter filed an opinion concurring in the judgment in part and dissenting in part. Justice Stevens filed a dissenting opinion, in which Justice Blackmun joined. Justice O'Connor filed a dissenting opinion, in which Justice Blackmun joined.

6. The Court in *Griffin v. Breckenridge* held that in order to establish a claim under the statute a plaintiff must prove that there was a "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." 403 U.S. 88, 102 (1971). Additionally, the Court in United Brotherhood of Carpenters, Local 610 v. Scott, 463 U.S. 825, 832-33 (1983), held that § 1985(3) protected persons from the deprivation of constitutional rights that could be violated by private conspirators. Among the rights protected from private interference were the right to interstate travel and rights within the penumbra of the Thirteenth Amendment. *Griffin*, 403 U.S. at 105-06; *Scott*, 463 U.S. at 832-33.

7. *Bray*, 113 S. Ct. 753.

8. *See id.* at 769 (Souter, J., dissenting); 779 (Stevens, J., dissenting); 799 (O'Connor, J., dissenting). *See also Griffin*, 403 U.S. at 105-06; *Scott*, 463 U.S. at 832-33.

9. H.R. 796, 103d Cong., 1st Sess. (1993).

10. H.R. 796, § 2(a). See note 180 for text of the proposed legislation.

11. H.R. 796, § 2(c). See note 180 for text of the proposed legislation.

12. S. 636, 103d Cong., 1st Sess. (1993).

13. S. 636, § 3. See note 181 for text of the proposed legislation.

tection of women seeking abortions that the Supreme Court withdrew when it ruled that § 1985(3) could not be used to stop Operation Rescue's blockades of abortion clinics.

This article discusses the need for federal protection of women seeking abortion-related services and the denial of protection of those women by the Supreme Court's narrow holding in *Bray*. Part II examines the precedents leading up to the *Bray* decision. A review of these cases demonstrates that Operation Rescue is a national conspiracy aimed at eliminating the right to abortion. The group uses physical force and blockades clinics in order to deny women and health care workers access to these facilities. In light of the inability or unwillingness of local law enforcement agencies to provide access to the clinics and to protect women seeking abortions, the injunctions issued under § 1985(3) provided a needed federal remedy for constitutional violations. Part III analyzes the opinions in the *Bray* case in light of the legislative history of § 1985(3). A review of the legislative history of the statute supports the view that § 1985(3) was intended to have a broad reach, encompassing conspiracies to deprive persons of constitutional rights without reference to the invidiously discriminatory animus requirement of *Griffin* or the limited holding in *Scott*. Part IV discusses the proposed Freedom of Access Bill and concludes that there is a constitutional basis for such legislation.

II. The Road to *Bray v. Alexandria Women's Health Clinic*

Prior to the Supreme Court's decision in *Bray*, numerous federal courts had issued injunctions under § 1985(3) in an effort to afford relief to women seeking abortions from the blockades of Operation Rescue and other groups that used similar tactics to oppose abortion.[14] A review of several of these cases reveals that Operation Rescue was a loose-knit national organization, committed to breaking the law in an effort to dissuade or prevent women from seeking abortions.[15] Additionally, by force of numbers, these groups often overwhelm local law enforcement agencies, rendering them unable to protect women seeking to exercise their constitutional right to

14. *See, e.g.*, Women's Health Care Serv. v. Operation Rescue-Nat'l, 773 F. Supp. 258 (D. Kan. 1991); Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); New York National Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989); National Org. for Women v. Operation Rescue, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

15. *See* cases cited at note 14.

travel interstate to seek abortion services.[16]

The courts that issued injunctions, in the face of this widespread conspiracy, had little trouble recognizing that women seeking abortions were a cognizable class under § 1985(3) and that the actions of Operation Rescue satisfied all of the elements necessary for establishing a claim under that statute. In this regard, a review of the legislative history of the statute reveals that the application of § 1985(3) to restrain the activities of Operation Rescue was consistent with congressional intent. Thus, the Supreme Court in *Bray* betrayed both Congress's purpose in enacting § 1985(3) and the women who had relied on the statute to protect them against mob rule.

A. *Women's Health Care Services v. Operation Rescue-National*

In *Women's Health Care Services v. Operation Rescue-National*,[17] a medical facility, the Women's Health Care Services, challenged Operation Rescue's blockading of its clinic in Wichita, Kansas. The district court's findings of fact are illuminating as to the goals and tactics used by Operation Rescue in its direct action campaign in Wichita.

The district court stated that the purpose of Operation Rescue's activities in Wichita was to interfere with the constitutionally protected rights of women.[18] Counsel for the group admitted that the purpose of the organization was to prevent women from obtaining abortions.[19] Counsel further stated that the tactics employed in achieving that objective included abusing, harassing, or intimidating patients of the clinic so that they would not seek to enter the clinic and obtain an abortion.[20] Another tactic designed to further Operation Rescue's objectives was the physical blockade of the driveways and doors of the clinic, thereby preventing anyone from entering or exiting the facility.[21]

The court noted that when the physical blockade was employed, Operation Rescue was successful in closing down the clinics.[22] Relying on videotapes of the blockades, the court determined that

16. *See* cases cited at note 14.
17. 773 F. Supp 258 (D. Kan. 1991).
18. *Women's Health Care Serv.*, 773 F. Supp. at 261.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 262.

these were not spontaneous tortious or criminal acts.[23] The acts of individual members of Operation Rescue were coordinated by several of the named defendants, including Randall Terry, or other leaders of the organization.[24] The leaders wore distinctive clothing to assist in their control of the crowds.[25] They communicated with each other through the use of cellular phones and hand radios, and directions were given to the crowd via bullhorns.[26] It was clear to the court that the activities of Operation Rescue were part of a coordinated plan to deny access to abortion clinics.[27]

During the blockade, the mob would block private driveways leading to the clinics.[28] Additionally, the public streets in the vicinity of the clinics would also be blocked at the instruction of Operation Rescue's leaders.[29] The protestors would also block the entrances to the clinics and insert foreign substances into the door keyholes, thereby rendering it impossible to open the doors.[30]

The court also discussed the role of the police in responding to Operation Rescue's tactics. The court found that the individual protestors would move in slow motion upon arrest, delaying the speed with which the police could clear the entrance to a clinic.[31] The court stated that this deliberate delaying tactic was done with the apparent acquiescence of either the Wichita police or the City of Wichita.[32] Additionally, the protestors would refuse to identify themselves after arrest.[33]

In light of the facts of the case, the court issued a preliminary injunction against Operation Rescue's blockades of abortion facilities in Wichita.[34] The court determined that the plaintiffs had established a clear violation of § 1985(3) and rejected defendants' arguments that they had no class-based animus against women.[35] Operation Rescue contended that it was opposed to the practice of

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23. *Women's Health Care Serv.*, 773 F. Supp. at 262.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Women's Health Care Serv.*, 773 F. Supp. at 262.

29. *Id.* The court noted that the crowds were divided into teams, and each group would march into place when given instructions from a leader. *Id.*

30. *Women's Health Care Serv.*, 773 F. Supp. at 262.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 262-64.

35. *Women's Health Care Serv.*, 773 F. Supp. at 262, 264.

abortion and was not opposed to women as a class.[36] The court dismissed this contention and observed that the goal of the group was not to block the entry to the clinics, but instead to eliminate the right to obtain an abortion.[37] That goal infringed on the rights of women and women only. The court concluded that a conspiracy directed at depriving women of a constitutional right that arises from the natural qualities of womanhood constitutes the type of discriminatory animus that § 1985(3) was designed to remedy.[38]

Among the rights found to have been violated by the Operation Rescue conspiracy were the rights to privacy and to travel. With respect to the right to privacy, the court noted that private action that inhibits or thwarts the ability of local law enforcement agents to guarantee equal protection may cause the state to further the ends of the conspiracy.[39] By targeting Wichita as the site of its national effort to eradicate abortion rights, Operation Rescue overwhelmed the relatively small local police force, rendering it unable to operate effectively against the large crowds. Additionally, the group engaged in tactics, with apparent acquiescence on the part of local authorities, designed to frustrate efforts to arrest them. The court also found that the uncontroverted facts established that a significant portion of the patients served by the plaintiffs traveled interstate.[40] At one clinic, between 8-10% of the patients were from out-of-state;[41] at another, 44% of the patients were nonresidents.[42] The court determined that Operation Rescue's activities had hindered significant numbers of persons from travelling interstate to obtain abortion services.[43] In light of its conclusion that Operation Rescue had violated § 1985(3), the court issued an injunction against the blockade.[44]

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36. *Id.*

37. *Id.*

38. *Id.* at 265.

39. *Id. See also* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) ("[I]f private persons take conspiratorial action that prevents or hinders the . . . State from giving or securing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment . . . ."). The right to abortion is included within the penumbra of rights protected under the Fourteenth Amendment. *Roe v. Wade*, 410 U.S. 113 (1973).

40. *Women's Health Care Serv.*, 773 F. Supp. at 265-67.

41. *Id.* at 266.

42. *Id.* at 266-67.

43. *Id.*

44. *Id.* at 270.

B. *Planned Parenthood Association v. Holy Angels Catholic Church*

In the face of blockades of its medical clinic in Daly City, California in 1991, Planned Parenthood sought injunctive relief against Operation Rescue and other defendants.[45] The court determined that protestors intimidated and harassed Planned Parenthood's staff and patients. Individual defendants accused patients and staff of being "baby killers" and "murderers," attempted to intimidate patients from obtaining abortions, blocked entrances to the clinic, threatened staff members with bodily harm, and impeded the ability of patients to walk into the clinic.[46] The protestors also shoved plastic replicas of fetuses into the faces and cars of Planned Parenthood patients and staff.[47]

The court decided that this conduct caused great emotional distress to the patients and staff of the clinic.[48] Patients were often so upset by the protestors' conduct that they had to reschedule their appointments, requiring more advanced and potentially dangerous medical procedures.[49] In addition, the clinic had to obtain volunteers to escort the patients from their cars because of the aggressive conduct of the protestors.[50] Planned Parenthood sought police assistance, but the police claimed that an injunction was required before they could take action.[51]

On the basis of these facts, the district court issued an injunction against the protestors.[52] The court rejected Operation Rescue's contention that it harbored no ill-will towards the patients of the clinics, but was opposed to abortion as a practice.[53] While agreeing that the group had a right to protest, the court concluded that Operation Rescue's conduct infringed on the right of women

45. Planned Parenthood Ass'n v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991). The Holy Angels Catholic Church was named as a defendant due to the activities of the pastor of that church. The Roman Catholic Archbishop of San Francisco filed a declaration with the court stating that the Archdiocese was the owner of the defendant church and did not condone or encourage interference with the operation of the plaintiff's clinic. Accordingly, the court ruled that the injunction it issued would not run against the church. *Planned Parenthood*, 765 F. Supp. at 619.

46. *Id.* at 620.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Planned Parenthood*, 765 F. Supp. at 620-21.

51. *Id.*

52. *Id.* at 620.

53. *Id.* at 623-24.

to obtain abortions.[54] There was evidence that women were so intimidated by the invasive conduct of the defendants that they delayed the abortion procedure, thereby exposing themselves to physical harm.[55] In finding that Operation Rescue had displayed the requisite animus, the court noted that the defendants were not required to actually dislike or hate women in order to violate § 1985(3).[56]

In reaching its conclusion that the defendants had violated § 1985(3), the court based its decision on the right to travel.[57] In concluding that Operation Rescue's blockade interfered with the right to travel, the court noted that the Supreme Court had determined that citizens of the United States had the right to travel across state lines,[58] and that private conspiracies to deprive citizens of this right were actionable under the statute.[59] Thus, the court concluded that Operation Rescue's blockades had the proscribed effect of depriving citizens of the right to travel.[60] The court rejected the defendants' two-fold argument wherein the defendants' contended that they did not intentionally interfere with the right to travel, but instead, were opposed to all women, residents and non-residents, obtaining abortions.[61] The court determined that the interference with the right to travel was found in the fact that the protestors, by their conduct, had impaired the right of pregnant women to travel to obtain abortion services.[62] The defendants may have harassed all women equally, but that did not mean that they had not violated the rights of some women to travel.[63] Accordingly, the court issued a preliminary injunction against Operation Rescue's blockade.[64]

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54. *Id.*

55. *Planned Parenthood*, 765 F. Supp. at 623-24.

56. *Id.*

57. *Id.*

58. *Id.* at 624. *See, e.g.*, United States v. Guest, 383 U.S. 745 (1966).

59. *Planned Parenthood*, 765 F.Supp. at 624. *See, e.g.*, Griffin v. Breckenridge, 403 U.S. 88 (1971).

60. *Planned Parenthood*, 765 F. Supp. at 624.

61. *Id.*

62. *Id.*

63. *Id. See also* Doe v. Bolton, 410 U.S. 179 (1973) (The Court struck down a state residency requirement that impaired the right of nonresident women to seek medical services as violative of the constitutional right to travel.).

64. *Planned Parenthood*, 765 F. Supp. at 626.

C. *New York National Organization for Women v. Terry*

In *New York National Organization for Women v. Terry*,[65] a coalition of women's organizations and abortion providers initiated an action under § 1985(3) against Operation Rescue and sought injunctive relief prohibiting the defendants from blocking access to medical facilities in the New York metropolitan area.[66] The district court, in its opinion granting plaintiffs' motion for summary judgment, recited the following facts. Operation Rescue had organized and publicized a week of protests to be carried out in the New York City area from April 30, 1988, until May 7, 1988.[67] Protestors would converge each day on an abortion clinic in an effort to close down the facility.[68] The targeted facility was not notified in advance of the demonstration.[69]

On May 2, 1988, Operation Rescue conducted a demonstration in front of a physician's office in Manhattan.[70] Five hundred protestors blocked access to the physician's office for at least five hours, and the police arrested 503 demonstrators for disorderly conduct.[71] On the following day, several hundred demonstrators were arrested in Queens, New York, for blocking access to an abortion clinic.[72] On May 5, 1988, Operation Rescue blocked access to an abortion clinic in Hicksville, Long Island, for approximately three hours.[73] On May 6, 1988, demonstrators returned to the Manhattan physician's office and again blocked access to that facility.[74]

On the basis of the factual record, the court determined that all of the elements of a § 1985(3) claim were satisfied. The court ruled that gender-based discrimination satisfied the animus requirement of § 1985(3).[75] In light of the defendants' admissions that their ac-

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65. 704 F. Supp 1247 (S.D.N.Y. 1989).
66. *Terry*, 704 F. Supp. 1250-51.
67. *Id.* at 1251.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Terry*, 704 F. Supp. at 1251.
72. *Id.* at 1252.
73. *Id.*
74. *Id.*
75. *Id.* at 1259. A number of circuit courts had also held that gender-based discrimination is actionable under § 1985(3). *See e.g.*, Volk v. Coler, 845 F.2d 1422, 1434 (7th Cir. 1988); Stathos v. Bowden, 728 F.2d 15, 20 (1st Cir. 1984); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1244 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 505 (9th Cir. 1979); Conroy v. Conroy, 575 F.2d 175, 177 (8th Cir. 1978).

tivities were targeted at women who choose abortion, the court concluded that the defendants had entered into a conspiracy with a proscribed objective.[76] The court also ruled that the undisputed facts established that the defendants' activities had obstructed access to medical facilities by women who had traveled from out of state.[77] Additionally, the actions of the defendants had interfered with the plaintiffs' constitutionally guaranteed right to travel.[78]

In addition to finding for the plaintiffs on the right to travel issue, the court also considered the plaintiffs' claim that Operation Rescue sought to deprive the plaintiffs and the classes they represented of their right to privacy under the hindrance clause of § 1985(3).[79] In contrast to the right to travel claim, there must be a claim of state involvement to prevail on a claim involving the deprivation of a right to privacy.[80] On the right to privacy claim, the court found that the defendants, by blocking access to abortion clinics in large numbers and by refusing to notify the police of their next target, had acted to render police officials incapable of providing women who choose abortion equal access to medical treatment.[81] There was additional evidence of state involvement in the conspiracy. The court found that at an October 29th demonstration in Dobbs Ferry, New York, the local police entered into an express agreement with Operation Rescue that no demonstrator would be arrested so long as the demonstrators agreed to leave the site by noon that day.[82] On the basis of the record, the court concluded that under the hindrance clause of § 1985(3), the plaintiffs had established a claim and that their rights to privacy had been violated.[83] In light of the foregoing, the district court issued a per-

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76. *Terry*, 704 F. Supp. at 1259.

77. *Id.* at 1259-60. The court concluded that the right to travel includes the right to unimpeded interstate access to obtain an abortion and other medical services. *Id. See also,* Doe v. Bolton, 410 U.S. 179, 200 (1973).

78. *Terry*, 704 F. Supp. at 1260. Because the right to travel can be violated by private actors, the plaintiffs were not required to demonstrate state involvement. *See, e.g., Griffin*, 403 U.S. at 105-06.

79. *Terry*, 704 F. Supp. at 1260. Under § 1985(3)'s hindrance clause, liability is established if it is shown that two or more persons conspire for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. *Id.*

80. *Id. See also, Scott*, 463 U.S. at 833.

81. *Terry*, 704 F. Supp. at 1260.

82. *Id.* at 1260 n.16.

83. *Id.* at 1260. Under the hindrance clause, if private actors engage in a conspiracy that prevents or hinders the local state authorities from providing equal treatment, the private persons would cause those authorities to violate the Fourteenth Amendment's equal protection clause. When such a conspiracy has the effect of rendering state authorities inca-

manent injunction restraining Operation Rescue's blockades.[84]

On appeal, the circuit court upheld the district court's issuance of the permanent injunction as a remedy for the § 1985(3) violations.[85] The appellate court rejected defendants' arguments that they held no animus towards women and that they were only seeking to demonstrate their opposition to abortion.[86] The circuit court stated that, in most cases of discrimination, constitutionally violative activity occurs as a response to activities that members of a certain class engage in which are abhorrent to the opponents of that conduct.[87] The court found that one of the objectives of the defendants was to infringe on the right of women to gain access to abortion facilities, and that the defendants' conduct had that result.[88] The circuit court also upheld the district court's conclusion that Operation Rescue's blockades had violated the right to interstate travel, but found it unnecessary to rule on the question of whether Operation Rescue had also violated the hindrance clause of § 1985(3) by impeding state authorities from providing protection to women seeking abortions.[89]

D. *National Organization for Women v. Operation Rescue*

In *National Organization for Women v. Operation Rescue*,[90] the plaintiffs sought to enjoin Operation Rescue's blockades of abortion clinics in the Washington, D.C. metropolitan area. The court found that the organization and its members would blockade an abortion clinic's entrances and exits, effectively closing the facility and denying women access.[91] The purpose of Operation Rescue's blockading of abortion clinics was to disrupt operations at these facilities and to cause the clinics to cease operation entirely.[92] The court stated that, by disrupting these clinics, "the defendants . . . hoped to prevent abortions, to dissuade women from seeking a

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pable of providing equal protection of the laws, § 1985(3) would provide the means of remedying such conduct. Great Am. Fed. Savings & Loan Ass'n v. Novotny, 442 U.S. 366, 384 (1979) (Stevens, J., concurring).

84. *Terry*, 704 F. Supp. at 1263-64.

85. *New York Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1343 (2d Cir. 1989).

86. *Terry*, 886 F. 2d at 1359-60.

87. *Id.*

88. *Id.* at 1360.

89. *Id.* at 1360-61.

90. 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *rev'd sub nom.* Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

91. *N.O.W.*, 726 F. Supp. at 1487.

92. *Id.* at 1488.

clinic's abortion services, and to impress upon members of society the . . . intensity of Operation Rescue's anti-abortion views."[93] The court found that the practice of preventing access to these facilities could be harmful to the health of women seeking or undergoing abortion-related treatment.[94] In addition to the risk to the physical health of the patients, the court concluded that these blockades could impose stress, anxiety, and mental harm on patients or potential patients.[95]

The court also found that substantial numbers of women seeking abortions in the Washington, D.C. metropolitan area traveled interstate to reach the clinics.[96] The court held that the blockading of abortion clinics had the effect of obstructing and interfering with the interstate travel of these women.[97] The court further held that Operation Rescue was able to close down clinics notwithstanding the efforts of the local police to prevent the clinics from being closed.[98] The court determined that limited police department resources, combined with the lack of advance notice identifying a target clinic, rendered it difficult for local police to prevent rescuers from closing a facility.[99]

After determining that the defendants had engaged in conduct

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93. *Id.* at 1488.

94. *Id.* at 1489. Specifically, the court found that for some women who elect to undergo an abortion, a pre-abortion laminaria is inserted to achieve proper cervical dilation. In order to avoid infection, such devices must be removed in a timely fashion. If the defendants closed a facility, women seeking laminaria removal would be placed at risk or would have to seek services elsewhere. There were numerous economic and psychological barriers to obtaining these services elsewhere. The court found that indigent or impecunious patients were provided abortion services at nominal fees by the clinics, whereas hospitals would require insurance or full payment. Thus, for these women Operation Rescue's blockade of an abortion facility could impose serious health risks. *Id.*

95. *Id.*

96. *N.O.W.*, 726 F. Supp. at 1489. Approximately 20-30% of the patients served at the Commonwealth Women's Clinic in Falls Church, Virginia, came from out of state. The records of these patients revealed they had permanent residences in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida. At the Hillview Women's Center in Forestville, Maryland, a majority of the patients traveled interstate to reach that clinic. *Id.*

97. *Id.*

98. *Id.* To support this conclusion, the court relied on trial testimony relating to the closing of the Commonwealth Women's Clinic. That clinic had been the object of Operation Rescue's blockades on almost a weekly basis for five years prior to the litigation. On October 29, 1988, the clinic was closed by the blockade despite the efforts of the Falls Church Police Department to keep the facility open. The testimony revealed that the department consisted of 30 deputized officers. On the date in question, the blockaders outnumbered the police officers, and even though 240 arrests were made, the clinic was closed for more than six hours. *Id.* at n.4.

99. *Id.*

that could result in a deprivation of constitutional rights, the court analyzed the facts to ascertain whether a § 1985(3) violation was established. The court found that gender-based discrimination satisfied the class-based discriminatory animus element of the statute.[100] Thus, a conspiracy to deprive women seeking abortions of their right to travel interstate to obtain such services was actionable under the statute.[101] Based on its factual findings, the court concluded that the defendants had engaged in a conspiracy to deprive women seeking abortions or related medical services of the right to travel.[102] Furthermore, the court determined that since the right to interstate travel is protected against both purely private as well as governmental interference, there was no need to show state action.[103] Having determined that the plaintiffs had established a violation of § 1985(3), the court issued a permanent injunction against the defendants, preventing them from staging further blockades of any Washington, D.C. metropolitan area abortion clinic.[104]

The Fourth Circuit upheld the district court's decision and the issuance of the permanent injunction.[105] The court agreed that gender-based animus satisfied the purpose element of § 1985(3).[106] The circuit also upheld the district court's conclusion that blocking access to medical services provided by abortion facilities that serve interstate clientele violated the constitutional right to interstate travel.[107]

E. *Operation Rescue Parallels the Ku Klux Klan*

The facts set forth in these four cases are representative of the conduct of Operation Rescue in demonstrating its opposition to abortion. The cases reveal that the organization went beyond the mere expression of a political viewpoint. It is clear that Operation Rescue and its adherents sought to eliminate abortion as a constitutional right and to impede women seeking to exercise their rights. The tactics used in furtherance of these ends were intimidation, threats of physical violence, and the blockading of clinic en-

100. *Id.* at 1492.
101. *N.O.W.*, 726 F. Supp. at 1493.
102. *Id.*
103. *Id.*
104. *Id.* at 1497.
105. National Org. for Women v. Operation Rescue, 914 F.2d 582 (4th Cir. 1990).
106. *N.O.W.*, 914 F.2d at 585.
107. *Id.*

trances. These tactics were used on a national scale and often overwhelmed the ability of local law enforcement personnel to secure to women seeking abortion-related services equal protection of the laws.

Additionally, the facts demonstrate that the use of these tactics was not a spontaneous eruption of individual activity. Operation Rescue's adherents were disciplined and well organized. The crowds were placed into teams, with team leaders who gave orders as to how to proceed. Thus, the activities of the group were evidence of a conspiracy to obstruct women in the exercise of a constitutional right. As many women at the clinics travelled interstate to receive these services, the group also impaired the ability of these women to travel freely.

The conduct of Operation Rescue is strikingly similar to the actions of another well-organized group that sought to frustrate and impede national policy in the nineteenth century—the Ku Klux Klan. In fact, Congress enacted § 1985(3) due to the widespread fear and intimidation that the Klan visited on African-Americans and their supporters during the Reconstruction era.[108] A review of the legislative history of § 1985(3) shows that the evil Congress sought to remedy in that statute was similar to the actions of Operation Rescue. Therefore § 1985(3) has been appropriately used by the courts to protect the rights of women to seek abortion services.

During the debate on § 1985(3),[109] the speakers discussed the evidence and nature of the problem which the Klan and similar organizations presented.[110] The incidents graphically recounted the

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108. Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357 (1992).

109. Ku Klux Klan Act, 42 U.S.C. §§ 1983, 1985, 1986 (1988). For a detailed analysis of the legislative history of the Act, see Randolph M. Scott-McLaughlin, Bray v. Alexandria Women's Health Clinic: *The Supreme Court's Next Opportunity to Unsettle Civil Rights Law*, 66 TUL. L. REV. 1357 (1992); Neil H. Cogan, *Section 1985(3)'s Restructuring of Equality: An Essay on Texts, History, Progress and Cynicism*, 39 RUTGERS L. REV. 515 (1987); Marilyn R. Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 TEMP. L. Q. 3 (1985).

110. There were no evidentiary hearings held prior to the introduction of the Ku Klux Klan Act. Congress relied on a report issued by a Select Committee of the Senate to Investigate Alleged Outrages in the Southern States. S. Rep. No. 1, 42d Cong., 1st Sess. (1871). While the committee was established to examine the existence of the Klan in the southern states, it was only able to investigate conditions in South Carolina. The report concluded that the Klan was responsible for numerous murders, whippings and shootings in that state. Regarding the purpose of the Klan, the report found that the Klan was opposed to the policies of Reconstruction, including the enfranchisement of African-Americans. *See* EVE-

evil that the Klan represented, its purposes, and the methods used to effectuate its ends. The evidence revealed that the Klan used violence and terror against African-Americans, their supporters, and Republicans in an effort to undo the gains of the Reconstruction era.[111] The Klan also directed its anger at northerners who went south after the war, and at native southerners who supported the Reconstruction policies of the federal government.[112] In addition, the Klan sought to supplant state and local governments by the use of the same tactics against government officials.[113] In some instances, those officials either acquiesced or conspired with the Klan.[114] Finally, the Klan vented its fury on indicia of federal authority.[115]

Several speakers in the House supported the thesis that the Klan was a covert, terrorist organization designed to eliminate the gains of Reconstruction.[116] Similar views were expressed in the Senate regarding the aim of the Klan. Senator Oliver P. Morton stated that the purpose of the Klan was to use terror and violence to intimidate African-Americans and others from supporting the Republican party and its political objectives.[117] Senator Morton

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RETTE SWINNEY, SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-77 (1987); ALLEN W. TRELEASE, WHITE TERROR, THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION (1971).

111. The testimony of James E. Boyd before the Senate Select Committee, relied upon by Representative William Stoughton in support of the Ku Klux Klan Act, is illustrative of the facts available to Congress. Boyd was a lawyer, a former Confederate soldier, and a Klansmen from Alamance County, North Carolina. He testified that the Klan's purpose was to defeat the Reconstruction policy of Congress and to prevent African-Americans from voting. Boyd averred that the Klan used any means necessary to carry out its objectives, including murder. CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871).

112. CONG. GLOBE, cited at note 111, at 320.

113. *See, e.g.*, CONG. GLOBE, cited at note 111, at 484 (remarks of Rep. Butler); *id.* at 484 (remarks of Rep. Wilson); *see generally* DAVID M. CHALMERS, HOODED AMERICANISM (1965).

114. CONG. GLOBE, cited at note 111, at 78. Representative Aaron F. Perry stated, "Where these gangs . . . show themselves the rest of the people look on, if not with sympathy, at least with forbearance. . . . Sheriffs, having eyes to see, see not." *See also, id.* at 368 (remarks of Rep. Sheldon) and *id.* at 107 (remarks of Sen. Pool).

115. Representative Butler stated that federal agents were whipped and shot at for attempting to carry out their duties. Cong. Globe, cited at note 111, at 445.

116. CONG. GLOBE, cited at note 111, at app. 153. Representative Garfield stated "that in some of the southern States there exists a wide-spread secret organization . . . to prevent certain classes of citizens of the United States from enjoying these new rights conferred upon them by the Constitution and laws." *Id. Accord, e.g., id.* at 459 (remarks of Rep. John Coburn); *id.* at 443-49 (remarks of Rep. Benjamin F. Butler); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelley); *id.* at 437 (remarks of Rep. Clinton L. Cobb).

117. CONG. GLOBE, cited at note 111, at app. 252. Senator Morton stated that "the

was not only concerned with the actual victims of the Klan's terror, but also expressed his belief that the violent actions of the Klan would discourage others from exercising their constitutional rights.[118] In addition to targeting African-Americans and Republicans for their peculiar brand of persuasion, the Klan also victimized others whose political views were inimical to the Klan.[119]

The proponents of the Ku Klux Klan Act saw the Klan as a well-organized group that was opposed to the national policy of Reconstruction and equality for African-Americans. In both the Senate and the House, concerns were expressed about the deprivation of rights by the Klan based on a variety of identifiers, such as race, political views, religion, or regional origins. In the minds of those who supported the statute, it was designed to remedy the denial of rights guaranteed under the Constitution to all classes of citizens targeted by the Klan or other organizations.[120] No supporter indicated any intention to limit the application of the statute to conspiracies motivated by racial animus. The incidents discussed by the supporters of the statute confirm that the Klan was an organization that engaged in violence and acts of intimidation against groups or individuals in an effort to reverse the gains of the Reconstruction era. The Klan also sought to render law enforcement agents, who often acquiesced in the Klan's intimidation tactics, ineffective.

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purpose is . . . to drive those who are supporting the Republican party to abandon their political faith or to flee from the State." *Id. See, e.g., id.* at app. 107 (remarks of Sen. John Pool); *id.* at 157 (remarks of Sen. Sherman); *id.* at 197 (remarks of Sen. Ames).

118. CONG. GLOBE, cited at note 111, at app. 252. Senator Morton stated that "[t]he whipping of a dozen Negroes, because they are Negroes and asserting their rights to equal enjoyment of liberty . . . and the expression of their opinions, will have the effect to terrify those who live for miles around." *Id.*

119. *Id.* at app. 311. In this regard, Representative Maynard stated:

> [T]he unpopular man, the man who entertains odious sentiments, the man whose religion . . . is at variance with the common belief, the man whose political views do not accord with the generally received opinions of the community in which he resides, finds his personal security very often in peril from the ebullitions of passion and the gusts of anger which agitate his immediate neighbors.

Id.

In Maynard's opinion, § 1985(3) was designed to protect all classes of persons who were subjected to attack for their political views or racial group status. *Id.* at app. 310. *See also id.* at 320 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelley); *id.* at app. 262 (remarks of Rep. Dunnell); *id.* at app. 277 (remarks of Rep. Porter); *id.* at 394 (remarks of Rep. Rainey); *id.* at 459 (remarks of Rep. Coburn); *id.* at app. 185 (remarks of Rep. Platt); *id.* at app. 300 (remarks of Rep. Stevenson); *id.* at app. 251 (remarks of Sen. Morton); *id.* at 567 (remarks of Sen. Edmunds); *id.* at 660 (remarks of Sen. Blair); *id.* at 686 (remarks of Sen. Schurz); *id.* at 606 (remarks of Sen. Pool).

120. See note 119 and accompanying text.

There are numerous parallels between the Klan and Operation Rescue. Both organizations opposed a national policy. The Klan sought to reverse the gains of Reconstruction, and Operation Rescue sought to eliminate abortion rights. Both groups used intimidation tactics as a means of achieving their ends. Both groups targeted individuals who sought to exercise constitutional rights. The Klan sought to reverse the gains made by African-Americans under the Thirteenth and Fourteenth Amendments, and Operation Rescue sought to reverse the Supreme Court's opinion in *Roe v. Wade*.[121] Operation Rescue also sought to prevent women from exercising their constitutionally protected right to obtain an abortion and to travel interstate for that purpose. Both organizations, through sheer numbers or the use of intimidation tactics, were able to render ineffective local governments and law enforcement agents. In light of the parallels between the activities of the Klan and Operation Rescue, the statute designed by Congress to curb the former should have been applicable to the latter. Clearly, Operation Rescue is an interstate entity, committed to employing extralegal means to accomplish its objectives. Operation Rescue's blockades have the effect of intimidating women from seeking abortion services and impeding the interstate travel of women to obtain such services. Thus, the federal remedy created by Congress in § 1985(3) seems appropriate in the context of Operation Rescue's blockade of abortion clinics. Unfortunately, in *Bray v. Alexandria Women's Health Clinic*[122] a majority of the Supreme Court disagreed with this position.

III. The Supreme Court's Rejection of § 1985(3) as a Remedy for Blockades of Abortion Facilities

In *Bray*, the majority opinion began its analysis of § 1985(3) by reviewing the Court's precedent regarding the interpretation of the statute.[123] In order to prevail on a § 1985(3) claim, a plaintiff has to show the existence of a private conspiracy aimed at interfering with constitutional rights that are protected against private or official encroachment.[124] The Court had also noted in *Griffin*[125] that

121. 410 U.S. 113 (1973).

122. 113 S. Ct. 753 (1993).

123. For an analysis of the facts and lower court holdings in *Bray*, see notes 90-104 and accompanying text.

124. *Bray*, 113 S. Ct. at 758. *See also Griffin*, 403 U.S. at 102; *Carpenters*, 463 U.S. at 833.

125. *Griffin*, 403 U.S. at 102.

the conspiracy must have been motivated by an invidiously, discriminatory intent. The *Griffin* majority explained the rationale for the discriminatory intent requirement as necessary to avoid interpreting the statute as a general federal tort law.[126]

The *Bray* Court took note of the respondents' contention that opposition to abortion constituted the type of discriminatory animus that would satisfy *Griffin's* class-based intent requirement.[127] The majority, however, rejected this argument, stating that opposition to abortion did not constitute discrimination against a class of women seeking abortions.[128] The Court opined that the term "class" as used in *Griffin* meant more than a group that shares a common desire to engage in conduct that is opposed by another group of persons.[129] According to the majority, if a class could be defined so easily, innumerable tort plaintiffs would be able to assert claims under § 1985(3) and the result that the *Griffin* Court sought to avoid would be realized.[130] Accordingly, the majority concluded that "women seeking an abortion" did not qualify as a class for § 1985(3) purposes.[131]

Additionally, the majority rejected the respondents' contention that Operation Rescue was motivated by a discriminatory animus against women in general.[132] The Court found that the record did not indicate that Operation Rescue's blockades were motivated by a purpose directed specifically at women as a class.[133] The group defined its conduct as a rescue of innocent victims from abortionists.[134] Based on the record, the Court concluded that Operation Rescue's actions were not motivated by a discriminatory animus towards women, but by its intense opposition to abortion.[135]

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126. *Id.* The Court stated that the language of the statute, requiring intent to deprive persons of equal protection of the laws or equal privileges and immunities, meant that there must be some "racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*

127. *Bray*, 113 S. Ct. at 759.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Bray*, 113 S. Ct. at 760.

133. *Id.* at 759.

134. *Id.*

135. *Id.* at 760. The Court noted:

> Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations.

The Court also determined that respondents' § 1985(3) claim failed because they had not established that Operation Rescue's conspiracy was aimed at depriving them of a right guaranteed against private encroachment.[136] Respondents contended that Operation Rescue sought to deprive women of their constitutionally protected right to travel, relying on the fact that substantial numbers of women seeking services at the respondent clinics travelled interstate to reach these facilities.[137] The majority rejected this assertion, concluding that § 1985(3) requires that the conspiracy must be for the purpose of depriving others of a constitutional right.[138] In other words, the § 1985(3) defendant must have taken his or her action with an intent to deprive others of a right, and the conspiracy must have been entered into for the purpose of effectuating such deprivation. The Court reasoned that Operation Rescue was opposed to abortion, and it was irrelevant to the group's actions whether the abortions were performed after interstate travel.[139] The Court, however, did agree with the respondents that Operation Rescue's conduct was aimed at the right of abortion,[140] but concluded that such an objective was not actionable under § 1985(3) absent a showing of state involvement.[141]

Id.

136. *Id.* at 762.

137. *Bray*, 113 S. Ct. at 762.

138. *Id.*

139. *Id.* at 763.

140. *Id.* at 764. The right to abortion has been considered by the Court as within the penumbra of the Fourteenth Amendment. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-53 (1973).

141. *Bray*, 113 S. Ct. at 763. In *Carpenters*, the Court held that § 1985(3) did not apply to private conspiracies that "are aimed at a right that is by definition a right only against state interference." *Carpenters*, 463 U.S. at 833. The Court has held that the right to interstate travel and the right to be free from involuntary servitude are subject to interference by private actors. *See, e.g.*, United States v. Guest, 383 U.S. 745, 757-60 (1966) (right to interstate travel); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-40 (1968) (Thirteenth Amendment's protections can be infringed by private persons). Other constitutional rights that are protected from invasion by private individuals are the federal right to free access to the seat of government, Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867); the right peaceably to assemble to petition the government, United States v. Cruikshank, 92 U.S. 542, 552 (1876) ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances . . . is an attribute of national citizenship."), Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); the right of protection from attack while in the custody of a federal marshall, Logan v. United States, 144 U.S. 263, 285 (1884); and the right to inform federal officers of violations of federal law, *In re* Quarles, 158 U.S. 532, 535-36 (1895).

It is well established that Congress has the power to legislate for the protection of these fundamental rights against private interference. *See, e.g.*, *Guest*, 383 U.S. at 760 n.17 ("[T]he constitutional right of interstate travel is a right secured against interference from

Finally, the majority discussed whether the respondents had established a violation of the "hindrance" clause of § 1985(3).[142] After stating that this issue was not properly before the Court,[143] the majority went on to suggest that a claim under the "hindrance" clause requires the same elements as claims under the "deprivation" clause of § 1985(3).[144] Therefore, on the basis of its rulings that respondents had not established the class-based animus required under the statute and that Operation Rescue's conduct was not aimed at depriving women of the right to interstate travel, the Court questioned whether respondents could have succeeded on a hindrance claim.[145]

Justice Souter, while concurring in the judgment, took issue with the majority's approach to the class-based animus issue. While acknowledging that *stare decisis* necessitated adherence to *Griffin's* motivation element, Justice Souter questioned whether the Court had interpreted § 1985(3) correctly when it announced the animus criterion.[146] In his view, the animus requirement had narrowed the scope of the statute to the point of overkill.[147] Justice Souter stated that there was no indication in the legislative history that Congress intended the statute to reach only conspiracies motivated by racial animus or similar characteristics.[148] The list of character-

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any source whatever, whether governmental or private."); Guinn v. United States, 238 U.S. 347 (1915); *In re* Quarles, 158 U.S. 532 (1895); Logan v. United States, 144 U.S. 263 (1892); *Ex Parte* Yarbrough, 110 U.S. 651 (1884); United States v. Waddell, 112 U.S. 76 (1884); *see also* Howard M. Feuerstein, *Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights*, 19 VAND. L. REV. 642, 651-65 (1966).

142. *Bray*, 113 S. Ct. at 764-65. The "hindrance" clause of § 1985(3) is violated if "two or more persons . . . conspire . . . for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws." 42 U.S.C. § 1985(3).

143. *Bray*, 113 S. Ct. at 764-65. The Court noted that the complaint did not expressly include a claim under the hindrance clause and that this issue was not included within the questions on which the petitioners sought certiorari. *Id.* Justice Souter, in the dissenting portion of his opinion, disagreed with the majority's conclusion on this issue and stated that the applicability of the hindrance clause was fairly included within the questions presented. *Id.* at 770. (Souter, J., concurring in the judgment in part and dissenting in part).

144. *Id.* at 776.

145. *Id.*

146. *Id.* at 776.

147. *Id.* at 772.

148. *Bray*, 113 S. Ct. at 772 (Souter, J., concurring in part and dissenting in part). There is ample support in the legislative history for the proposition that Congress intended the statute to reach conspiracies designed to deny any class of persons, without regard to race, rights protected by the Constitution. With respect to the groups within the penumbra of the statute, Senator Edmunds stated:

We do not undertake in this bill to interfere with what might be called a private

istics identified in the legislative history as within the scope of § 1985(3) was far broader than race.[149] Furthermore, no sponsor suggested that only conspiracies motivated by a discriminatory animus would fall within the purview of the statute. The legislative history supports the conclusion that a class under § 1985(3) could have a very broad definition. Nevertheless, due to the Court's earlier misreading of the statute and the weight of *stare decisis*, both the majority and Justice Souter were unwilling to revisit the question of the classes protected under the deprivation clause of the statute.[150]

Justice Souter did not feel similarly restrained in the interpreta-

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> conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, . . . , or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.

CONG. GLOBE, cited at note 111, at 567.

Senator Morton also had an expansive view of the scope of classes protected under the statute:

> If there be organizations in any of the States having for their purpose to deny to any class or condition or men equal protection, to deny to them the equal enjoyment of rights secured by the Constitution of the United States, it is the right and duty of Congress to make such organizations and combinations an offense against the United States.

Id. app. at 251.

Similar views were expressed in the House. Representative Maynard stated that "[u]nder this section I hold that if a body of men conspire to drive out all the northern men, all the 'Yankees,' all the 'carpet-baggers' from the community, their offense comes within the condemnation of this provision." *Id.* app. at 310; *see also, e.g., id.* at 332 (remarks of Rep. Hoar) ("[L]arge numbers of our fellow-citizens are deprived of the enjoyment of the fundamental rights of citizens . . . because their opinions on questions of public interest do not coincide with those of a majority of the American people."); *id.* at app. 311 (remarks of Rep. Maynard) ("[T]he unpopular man, . . . , the man whose political views do not accord with the generally received opinions of the community in which he resides, finds his personal security . . . in peril"); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 339 (remarks of Rep. Kelley); *id.* at 394 (remarks of Rep. Rainey).

As is evident, the legislative history supports Justice Souter's view that the Court in *Griffin* had misinterpreted § 1985(3) when it created a class-based, invidiously discriminatory animus requirement as an element of a claim under the statute. It was this requirement that the *Bray* majority found lacking in the respondents' case, because the respondents did not show that Operation Rescue bore ill will towards women as a group. Clearly, the sponsors and supporters of the Ku Klux Klan Act did not believe that that type of intent was necessary under the statute.

149. CONG. GLOBE, cited at note 111, at 567.

150. *Bray*, 113 S. Ct. at 771-72 (Souter, J. concurring in part and dissenting in part). The first clause of § 1985(3) covers conspiracies for the purpose of depriving any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the law. 42 U.S.C. § 1985(3).

tion of the hindrance or prevention clause of the statute.[151] As a threshold matter, since the Court had not yet interpreted the hindrance clause, the burden of precedent was nonexistent.[152] Justice Souter believed that it was unnecessary to read *Griffin's* limiting interpretation into the hindrance clause because in order to violate the hindrance clause a private conspiracy must act with enough force to overwhelm the capacity of local authorities to secure equal protection of the law.[153] In order to satisfy the requirement of affecting the law enforcement authorities, a conspiracy would have to be able to counter large numbers of police officers.[154] Thus, Justice Souter contended that the requirement that the conspiracy have the capacity to overwhelm a local law enforcement agency sufficiently narrowed the scope of § 1985(3)'s hindrance clause so that the discriminatory animus provision of the deprivation clause was unnecessary.[155]

Additionally, Justice Souter believed that the requirement that a § 1985(3) conspiracy be aimed at a right susceptible to private encroachment should not be read into the hindrance clause. Unlike the deprivation clause, a conspiracy under the hindrance clause would have as its goal the prevention or hindrance of state actors from providing equal protection to its citizens or other persons within the state. The objective of such a conspiracy is to prevent local law enforcement officers from discharging their constitutional duties. In a sense, the conspiracy's aim would be to supplant or replace state power and determine how that power was to be exercised. Under Justice Souter's analysis, Congress has the power to prevent state authorities from abridging Fourteenth Amendment rights and to legislate against the usurpation of state power by a conspiratorial mob.[156] Accordingly, Justice Souter concluded that

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151. *Bray*, 113 S. Ct. at 771-72 (Souter, J., concurring in part and dissenting in part). "The second clause of the statute prohibits conspiracies for the purpose of preventing or hindering state authorities from securing to all persons within such state the equal protection of the laws." *Id.*

152. *Bray*, 113 S. Ct. at 771 (Souter, J., concurring in part and dissenting in part).

153. *Id.*

154. *Id.*

155. *Id.* at 771, 775.

156. *Id.* at 776. There is support in the legislative history for Justice Souter's view regarding the hindrance clause. Representative Horatio C. Burchard contended that Congress had the power to "punish the illegal attempts of private individuals [who sought] to prevent the performance of official duties in the manner required by the Constitution and laws of the United States." CONG. GLOBE, cited at note 111, at app. 314. Representative Luke P. Poland shared this view of Congress's power under the Fourteenth Amendment:

When the state has provided the law, and has provided the officer to carry out the

the hindrance clause may be applied to a conspiracy intended to impede or overwhelm the capacity of state authorities to secure equal protection of the laws, even when there was no showing of discriminatory animus, and even when the object of the conspiracy was to violate a constitutional guarantee that applied solely to state actors.[157]

Under Justice Souter's analysis, a conspiracy fell within the terms of the hindrance clause when its purpose was to hinder or prevent law enforcement authorities from providing protection to women attempting to exercise their right to abortion.[158] He concluded, however, that there had been no express finding that the purpose of the conspiracy was to prevent the police from protecting women seeking abortion services.[159] Accordingly, Justice Souter was of the opinion that the case should have been remanded to the district court.[160]

Justice Stevens, in his dissent, agreed with Justice Souter's analysis of the hindrance clause,[161] but believed that there was sufficient evidence in the record to support a finding that Operation Rescue had violated the hindrance clause.[162] In his view, the evidence established that Operation Rescue was involved in a nationwide conspiracy, and that it occupied public streets and trespassed on the premises of private citizens in order to prevent or hinder law enforcement authorities from ensuring access to abortion clinics by women, a substantial number of whom travelled interstate to reach the clinics blockaded by the petitioners.[163] He believed that this conduct bore a striking similarity to the kind of zealous, politically motivated conduct that led to the enactment of the Ku Klux Klan Act.[164]

Justice Stevens concluded that one of the goals of the statute was to provide federal protection against the kind of disorder and

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law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States.

Id. at 514; *accord id.* at 486 (remarks of Rep. Cook); *id.* at 579 (remarks of Sen. Trumbull).

157. *Bray*, 113 S. Ct. at 776-77 (Souter, J., dissenting).

158. *Id.* at 777.

159. *Id.* at 779.

160. *Id.*

161. *Id.* at 795-96 (Stevens, J., dissenting).

162. *Bray*, 113 S. Ct. at 795-96 (Stevens, J., dissenting).

163. *Id.*

164. *Id.* at 782.

anarchy that the state may be unable to control.[165] There was evidence in the record that Operation Rescue's blockades had that effect. The lack of advance warning, combined with limited police resources, made it difficult for the police to prevent Operation Rescue from effectively closing abortion clinics for several hours at a time.[166] There were also examples of Operation Rescue overwhelming local law enforcement officials by sheer force of numbers.[167]

Justice Stevens also took issue with the majority's rejection of respondents' right to travel claim.[168] In Justice Stevens' view, the right to travel interstate takes on greater importance in light of the diversity of regulation of abortion procedures among the states.[169] There was evidence in the record that interference with a woman's ability to visit another state to obtain an abortion was essential to the achievement of Operation Rescue's ultimate objective—the complete elimination of abortion services. Moreover, Justice Stevens contended that Operation Rescue's blockades made clinics inaccessible to women who had engaged in interstate travel for the purpose of obtaining an abortion.[170] This burden on interstate travel was not only foreseeable, but was the intended consequence of the blockaders.[171] In light of the factual record and findings of the district court, Justice Stevens concluded that Operation Rescue had interfered with the right of women to travel interstate to seek abortions and, therefore, had violated the hindrance clause.[172]

In her dissenting opinion, Justice O'Connor disagreed with the majority's view that the respondents had failed to satisfy the class-based animus requirement. She concluded that § 1985(3) reached a conspiracy whose motivation was directly related to characteristics unique to a class.[173] In *Bray*, the victims of Operation Rescue were linked by their ability to become pregnant and by the ability to terminate that condition.[174] As these are characteristics that are unique to women, Justice O'Connor concluded that Operation Res-

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165. *Id.*
166. *Id.*
167. *Bray*, 113 S. Ct. at 781 (Stevens, J., dissenting).
168. *Id.* at 792. *See also*, Doe v. Bolton, 410 U.S. 179, 200 (1973), where the Court held that a woman's right to engage in interstate travel for the purpose of seeking abortion services available in another state was protected under the privileges and immunities clause of the Constitution. U.S. CONST., art. IV, § 2.
169. *Bray*, 113 S. Ct. at 792 (Stevens, J., dissenting).
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at 802 (O'Connor, J., dissenting).
174. *Bray*, 113 S. Ct. at 802 (O'Connor, J., dissenting).

cue had taken actions against these women due to characteristics unique to a class, and thereby violated the statute.[175]

Similarly, Justice O'Connor rejected Operation Rescue's claim that it was not motivated by a discriminatory animus towards women, but by its opposition to abortion. She asserted that the petitioners were free to express their views on abortion, but they had gone beyond speech when they targeted women seeking abortions and took actions designed to prevent them from exercising their constitutional rights.[176] She concluded that it was undeniable that Operation Rescue's purpose was to target women seeking abortions and to prevent them from obtaining those services, and that this motivation satisfied *Griffin's* animus requirement.[177] On the basis of the record below, Justice O'Connor concluded that Operation Rescue's actions, and the injuries it occasioned, fell squarely within the ambit of the statute.[178]

In *Bray*, the majority rejected an opportunity to interpret § 1985(3) in a manner consistent with congressional intent. The impetus for the enactment of the statute was an interstate conspiracy that targeted individuals and groups of persons who sought to engage in activities or held views that were opposed by the conspirators. The nineteenth century conspirators were activists who used unlawful means to achieve their ends. The tactics employed by the Ku Klux Klan included intimidation, threats of violence and the use of terror tactics. This was the evil that the Ku Klux Klan Act was designed to remedy, and it should have applied to similar conspiracies in the late twentieth century.

While no one can contend seriously that Operation Rescue and the Ku Klux Klan are one and the same, the facts of the *Bray* case reveal that there are notable parallels between the two groups. Operation Rescue and its adherents formed an interstate conspiracy to interfere with the practice of abortion. The group went beyond the mere advocacy of ideas and engaged in trespassory conduct designed to stop women from obtaining abortions. In furtherance of this unlawful conspiracy, the group blockaded abortion clinics and denied access to the clinics, resulting in risks of physical and emotional harm to women who sought to use the blockaded facilities. Additionally, the local law enforcement authorities were unable, due to lack of resources or will, to provide adequate protection

175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*

to the women who sought to obtain abortion services at the blockaded clinics. In light of these facts, the federal remedy created by Congress for the vindication of rights against private conspiratorial interference should have been available to women who sought the protection of the federal courts.

Instead of permitting the use of a federal remedy to protect women seeking abortions, the majority, in an opinion that ignored both the legislative history of the statute and the egregious facts of the case, interpreted § 1985(3) in an exceedingly narrow fashion so as to preclude the statute's application in the abortion context. In the past, the Court's approach to Reconstruction era civil rights statutes has been to accord them a sweep as broad as their language.[179] In *Bray*, the majority did just the opposite, precluding application of the statute to a factual paradigm that its language clearly covered. After *Bray*, the only method for resurrecting § 1985(3) was congressional action.

IV. Congressional Efforts to Provide a Federal Remedy Against the Blockades of Abortion Clinics

In the wake of the *Bray* decision, two bills were introduced in Congress to address the national conspiracy by Operation Rescue to deny access to abortion clinics. In the House of Representatives, Congressman Charles Schumer introduced the Freedom of Access to Clinic Entrances Act.[180] In the Senate, Senator Edward Ken-

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179. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Griffin v. Breckenridge, 403 U.S. 88 (1971); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); United States v. Price, 383 U.S. 787 (1966).

180. H.R. 796, 103d Cong., 1st Sess. (1993). Section 2 of the proposed bill, as amended on March 25, 1993, provides as follows:

> (a) Whoever, with intent to prevent or discourage any person from obtaining reproductive health services, intentionally and physically obstructs, . . . the ingress or egress of another to a medical facility that affects interstate commerce . . . shall be subject to the penalties provided in subsection (b) of this section and the civil remedy provided in subsection (c) of this section.
>
> (b) The penalty for an offense under subsection (a) of this section is a fine . . . or imprisonment—
>
> (1) for not more than one year, in the case of a first conviction under this section; and
>
> (2) for not more than three years, in the case of an offender who has been convicted of a previous offense under this section;
>
> or both such fine and imprisonment.

Id.

Section 2 (c) provides for a civil damage action:

> (c)(1) A qualified plaintiff may in a civil action obtain appropriate relief with respect to any violation of subsection (a) of this section.

nedy introduced a similarly entitled bill.[181] A major issue to be addressed in connection with the proposed legislation is the extent of congressional power to remedy the blockades of Operation Rescue and similar organizations. One potential source of congressional power in the arena of public welfare is the Commerce Clause.[182] Under that clause, Congress has broad plenary power to legislate in the public welfare arena.[183] The question remains, however, as to whether Congress has an adequate basis for developing legislation regarding the blockades. The statement of purposes for the

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(c)(2) As used in this subsection, a "qualified plaintiff" with respect to a violation is -

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(A) the person whose ingress or egress is or is about to be obstructed . . . .
(B) a person whose obtaining reproductive services is intended to be prevented or discouraged;
(C) the medical facility, or any of its medical or administrative staff; or
(D) the owner of the structure or place in which the medical facility is located.

Id.

Under section 3 of the proposed bill, a successful plaintiff could be awarded treble damages, including an award for pain and suffering and emotional distress, or damages in the amount of $5,000 whichever is greater. Punitive damages would not be available under the statute. Additionally, injunctive relief is available. *Id.* at section 3.

181. S. 636, 103d Cong., 1st Sess. (1993). Section 3 of S. 636 provides, in pertinent part:

(a) PROHIBITED ACTIVITIES.—Whoever—

(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or class of persons, from—
(A) obtaining abortion services; or
(B) lawfully aiding another person to obtain abortion services; or
(C) intentionally damages or destroys the property of a medical facility or in which a medical facility is located, or attempts to do so, because such facility provides abortion services;

shall be subject to the penalties provided in subsection (b) and the civil remedy provided in subsection (e).

Id.

Under subsection (b), a first offense of the proposed bill can be punished by a fine or imprisonment of not more than 1 year, or both. Second offenders can be punished by a fine or imprisonment of not more than 3 years, or both. If bodily injury results, the length of imprisonment can be up to 10 years, and if death results, an offender can be sentenced to imprisonment for a period of years or life. *Id.* at section 3, subsection (b). Under subsection (e), a court may award damages, including punitive damages, and appropriate injunctive relief. *Id.* at section 3, subsection (e).

182. The Commerce Clause provides that "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST., art. I, § 8.

183. *See, e.g.*, Civil Rights Act of 1964, §§ 201-07, 42 U.S.C. § 2000a (1982) (public accommodations); *id.* §§ 701-16, 42 U.S.C. § 2000e (employment); *see also, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

bills, and the facts adduced at the hearings on the proposed legislation, supports the conclusion that Congress has a rational basis for concluding that blockades of abortion clinics have an adverse impact on interstate commerce.

Senate Bill 636 seeks to establish that it fits within the parameters of congressional power under the Commerce Clause. Section 2(a) states that medical clinics offering abortion services have been targeted by an interstate campaign of violence and obstruction aimed at closing the facilities and intimidating those seeking to obtain abortion services.[184] This conduct has denied women access to health care providers and exposes women to increased medical risks, thereby jeopardizing the public health and safety. Section 2(a)(4) states that the methods used to deny women access to these clinics include bombings, arson, murder, and other acts of force and threats of force.[185]

After setting forth the factual predicate, section 2(a)(6) states that this conduct not only infringes upon women's ability to exercise their rights, but it also burdens interstate commerce, by interfering with the business activities of the medical clinics involved in interstate commerce.[186] This section also states that this conduct forces women to travel from states where their access to reproductive health services is obstructed to other states in order to obtain medical services.[187] Section (2)(b) states that the purpose of the bill is to protect and promote the public health and safety by prohibiting the use of force, threat of force or physical obstruction to injure, intimidate or interfere with a person seeking to obtain or provide abortion services.[188]

In hearings on the House version of the bill, testimony was adduced that clearly showed that the activities of Operation Rescue prevented women who had traveled across state lines from gaining access to medical facilities, exposing them to physical risk.[189] Testi-

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184. S. 636, §2(a).

185. S. 636, §2(a)(4).

186. S. 636, §2(a)(6).

187. *Id.*

188. S. 636, §2.

189. *Hearings on Clinic Blockades Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 21 (1992) [hereinafter *House Hearings*]. The testimony of Silvia Doe of Virginia graphically demonstrates the impact that the Wichita, Kansas, blockades had on the ability of women to obtain abortion services. Ms. Doe testified that she traveled from her home state of Virginia to Kansas in order to obtain a third trimester abortion, a service not provided in Virginia. Ms. Doe further testified that she had to wait two weeks before she could go to Wichita due to Operation Rescue's closing of the clinic. *House Hearings* at 10. When she arrived in Wichita, it

mony was also adduced that, in some instances, local law enforcement efforts to protect women were non-existent or limited at best.[190] The testimony before the Senate Subcommittee demonstrated that the blockades had a deleterious effect on the ability of the clinics to function economically.[191] The facts demonstrate that women traveling in interstate commerce have been burdened due to Operation Rescue's blockades. Additionally, clinics have been financially damaged due to the violence of the blockaders and the reduction in business as a result of arson and bombings. Such tremendous impacts justify the proposed legislation.

Under the Commerce Clause, Congress has plenary power. The courts have sustained the exercise of that power when Congress has a rational basis for finding that an activity affects interstate commerce and employs reasonable means to regulate that activity.[192] With respect to regulations for the public welfare, Congress has been afforded a wide latitude under the Commerce Clause. In *Heart of Atlanta Motel v. United States*,[193] the Court upheld the

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took her three days to make her way through Operation Rescue's blockade, consisting of over 1,000 persons. After entering the clinic, she was forced to leave due to numerous bomb threats. *Id.* at 11. Similar testimony was provided by Kathryn Maxwell of Canton, Mississippi, who testified that she was denied access to a physician's office for prenatal care because Operation Rescue's blockaders were attempting to deny anyone access to this office because they alleged that abortions were performed at that location. *Id.* at 18. The testimony of Vicki Robinson of Landover, Maryland, was similar in nature. *House Hearings* at 20.

190. *House Hearings* at 19. Ms. Maxwell testified that when she approached a police officer for assistance, he refused to help her gain access in the face of the mob. *Id.* Ms. Doe testified that it appeared to her that the police were unwilling to enforce the law to protect her. *Id.* at 24.

191. *Freedom of Access to Clinic Entrances Act of 1993: Hearings on S. 636 Before the Senate Committee on Labor and Human Resources*, 103d Cong., 1st Sess. (1993) (Testimony of W. Craig at 2). Willa Craig, Executive Director of the Blue Mountain Clinic, Missoula, Montana, testified that after numerous blockades by anti-abortion activists, her clinic was firebombed, and no one was arrested. As a result of the fire, the clinic was only able to provide a fraction of its former services. The clinic was unable to accept any new patients. *Id.* Ms. Craig referred to a report, prepared by the National Abortion Federation, that indicates that since 1977 there have been 36 bombings of abortion clinics, 81 arsons reported, 327 clinic invasions, 84 cases of assault and battery, 563 clinic blockades, and 457 incidents of vandalism. *Id.* at 4. The National Abortion Federation report, annexed to Ms. Craig's testimony, indicates that the total damage to clinics within the federation amounts to $1,599,833.00, due to vandalism, arsons and bombings. *Id.* at 7.

192. *See, e.g.*, Preseault v. ICC, 494 U.S. 1 (1990); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Katzenbach v. McClung, 379 U. S. 294 (1964).

193. 379 U.S. 241, 245 (1964). In *Heart of Atlanta*, the owner of a motel in Atlanta, Ga., which denied service to African-Americans, challenged the constitutionality of the Civil Rights Act of 1964 as exceeding Congress's power under the Commerce clause. *Heart of Atlanta*, 379 U.S. at 243-44. The facts of the case revealed that the motel owner solicited customers from out-of-state through the use of national advertising media, served interstate

Civil Rights Act of 1964 because, inter alia, Congress could enact legislation, under its Commerce Clause powers, to promote the general welfare by eliminating discrimination based on race. While *Heart of Atlanta* arguably involved an establishment that serviced or solicited interstate travelers, *Katzenbach v. McClung* involved a local restaurant that served a purely local clientele.[194] Nevertheless, the Court held that Congress could have reasonably concluded that local discrimination created an artificial barrier to interstate commerce by restricting interstate travel of African-Americans and generally depressing the business climate.[195] These cases demonstrate that Congress has broad powers under the Commerce Clause.[196] Congress may regulate the activities of local enterprises so long as Congress rationally determines that conduct affects interstate commerce and employs a reasonable means to regulate that activity.[197]

The proposed Freedom of Access to Clinic Entrances Act fits squarely within the aforementioned precedents. The blockaded clinics are engaged in interstate commerce. These facilities provide medical services, including family planning, prenatal care, and abortion services. Many of the clinics are housed in office buildings and hospitals. The clinics purchase equipment, goods and services, employ individuals and generate income. The effect of Operation Rescue on the clinics' ability to engage in interstate commerce is evident on the basis of the record before Congress and the federal cases wherein injunctions were issued against Operation Rescue. Just as the Court found that a local restaurant purchased goods that had moved in interstate commerce and came within the ambit of the Civil Rights of 1964, the courts should have little difficulty finding that Congress rationally determined that the blockading of abortion clinics has an adverse impact on interstate commerce, be-

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clients, and was located at the intersection of several major highways. *Id.* On the basis of these facts, the Court concluded that Congress, in enacting the Civil Rights Act of 1964, properly exercised its Commerce Clause power. *Id.* at 258.

194. 379 U.S. 294 (1964). The restaurant in question, Ollie's Barbecue, only provided take-out service to African-Americans. The evidence showed that the restaurant used a substantial quantity of meat purchased by a local supplier from out-of-state sources. *McClung*, 379 U.S. at 296.

195. *Id.* at 300.

196. *See, e.g.*, Vincent A. Cirillo and Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L. Q. 901, 912 (1987) ("[T]he congressional commerce power [has] emerged as a virtually unlimited power."); Charles P. Light, Jr., *The Federal Commerce Power*, 49 VA. L. REV. 717, 728 (1963) ("[I]t is difficult to discern a meaningful limit to the [commerce] power . . . .").

197. *Hodel*, 452 U.S. at 276-77.

cause the clinics purchased goods and services that have traveled in interstate commerce.

Another basis for holding that the blockading of abortion clinics has a negative impact on interstate commerce is the fact that numerous women travel interstate to obtain abortion services. The testimony before the House Subcommittee concerning clinic blockades supports the view that women travel across state lines to obtain abortions.[198] The congressional statement of findings and purpose for Senate Bill 636 also states that the blockades of abortion clinics have burdened interstate commerce by forcing women to travel to other states because access to clinics is impeded in their states due to the activities of Operation Rescue.[199] Finally, the federal cases provide support for a finding that numerous women travel interstate to obtain abortion services.[200] Accordingly, the courts should have little difficulty finding that Congress rationally determined that the blockading of abortion clinics has a negative impact on women seeking to travel interstate to obtain abortions.

After analyzing the factual basis for the Freedom of Access to Clinic Entrances Act of 1993, the courts will turn to an analysis of whether Congress chose a reasonable means to achieve its purpose of eliminating a burden on interstate commerce occasioned by the blockades. The Act proscribes the use of force, threats of force, physical obstruction to injure, intimidate, or interfere with an individual seeking abortion services, and the destruction of the property of medical facilities. Because the Act focuses solely on conduct that involves violence or physical obstruction, it could be determined that the means Congress chose to effectuate legitimate ends were reasonably adapted to that purpose and not intended to suppress a particular message.[201] Finally, there is ample support for

198. See notes 189-190 and accompanying text.

199. See notes 184-188 and accompanying text.

200. *See, e.g., Bray*, 113 S. Ct. at 762 (The Court accepted the district court's finding that substantial numbers of women traveled interstate to abortion clinics in the Washington, D.C. area); New York National Org. For Women v. Terry, 886 F.2d at 1360.

201. The Court has held that the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." Texas v. Johnson, 491 U.S. 397, 406 (1989). The *Johnson* Court concluded that where speech and nonspeech elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms" so long as the governmental interest is unrelated to the regulated expression. *Id.* at 407 (quoting United States v. O'Brien, 391 U.S. 367, 376 (1969) (Court upheld a statute prohibiting destruction of draft cards because the government had an important interest in administering the selective service system)). The clinic access bill regulates violence, threats of violence, and physical destruction. The Act does not prohibit pick-

the conclusion that the blockades of Operation Rescue adversely impact interstate commerce and that Congress, under the authority of the Commerce Clause, chose a reasonable means to regulate the conduct of the blockaders.[202]

V. Conclusion

The battle over abortion rights has shifted from the courtrooms to the streets. Unsuccessful in their efforts before the Supreme Court to eliminate the constitutionally protected right of women to choose abortions, organized groups have employed violent means to prevent women from obtaining abortion services. These individuals have formed a national conspiracy that travels interstate to blockade medical facilities that provide abortion services. This conspiracy has used intimidation, bombs, arson, physical force and even murder, in an effort to achieve its ends. Local law enforcement agencies have proven either unable or unwilling to protect women seeking abortions.

In the face of this nationwide conspiracy, women and abortion clinics turned to the federal courts for relief. Numerous federal judges issued injunctions under the Ku Klux Klan Act of 1871, finding that the statute provided a remedy for the conduct of Operation Rescue and similar groups. Unfortunately, the Supreme Court in *Bray* rejected that approach and removed federal protection from women seeking abortion, leaving them to the will of the mob and the whim of local authorities.

In response to the Supreme Court's failure to afford federal protection to women seeking abortion services and to uphold the intent of Congress in enacting the Ku Klux Klan Act, Congress has proposed the Freedom Of Access to Clinic Entrances Act of 1993. The Act seeks, in part, to restore the protection of the federal court to women seeking abortion services. The courts should recognize that the Act is legitimately grounded on Congress' authority to regulate interstate commerce, and should apply it to protect women seeking abortion services. Without such federal protection, it is likely that the violence and terror visited upon women seeking to exercise their constitutional rights will continue unabated.

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eting, demonstrating, counselling or other expressions of views regarding abortion. The federal government has an interest in preventing violence when that conduct has an adverse impact on interstate commerce, especially when local law enforcement efforts are inadequate. The Act is limited to that objective and does not seek to restrict the peaceful expression of ideas.

202. See notes 192-197 and accompanying text.